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No.

In The Supreme Court of the United States

OCTOBER TERM 1997

NATIONAL MEDICAL ENTERPRISES, INC.,

Petitioner,

v.

DAVID K. BLEASDELL,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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I. STATEMENT OF THE CASE

Plaintiff David K. Bleasdell's claim alleges that NME violated the Age Discrimination In Employment Act, 29 U.S.C. 626(b), by terminating him because of his age. The Ninth Circuit Court of Appeal reversed the District Court's grant of summary judgment in favor of the defendant, National Medical Enterprises, Inc. (hereafter, "NME").

In August 1980, Bleasdell became employed as a corporate pilot and mechanic at NME. [CR 58,3] He worked there for approximately 11 years with good performance reviews, regular merit raises, promotions and no discipline. [CR 32; CR 58, 19-20, 3-4,7-9,11] He was terminated involuntarily on January 17, 1992 without prior notice. [CR 58, 12, Ex F]

At the time of termination, Bleasdell was the oldest pilot in the Department, at 52 years old. [Id., 39] Robert Metz was second oldest, at two months short of 48 years old. [CR 26, 5] The decision to terminate was made by Walter Kraujalis, who was approximately 35 years old. [Id., 40; CR 20, 10]

Approximately one year prior to termination, in late 1990, NME acquired a new jet, the Gulfstream III. [CR 32, 17 at 7:20-26, 20 at 9:16-21] In late 1990, NME's Aviation Department Manager, Robert Metz hired Walter Kraujalis as an independent contractor to help train NME pilots in the new aircraft. [Id., 16-17,19,21, and Ex. C.] In February, 1991, Metz hired Kraujalis as an NME employee to serve as a pilot and to

further train NME pilots on the new G-III. [CR 32 17, Ex C]

At NME, Kraujalis became acquainted with NME's Chief Executive Officer--Richard Eamer. Eamer paid Kraujalis' tuition for law-school, allowed him to work part-time, and excused attendance of the Department's weekly pilot's meetings. [CR 32, 4-5,38; CR 42, 34]

In January, 1992, Eamer demoted Robert Metz and made Kraujalis the new Department Manager. [CR 25, 3-4] Approximately two weeks later, Kraujalis fired several employees, including Bleasdell. [Id.] The verbal reason given was a "reorganization." [CR 58, 12] However, NME's Personnel Change Notice stated Bleasdell had "resigned to pursue other interests." [Id.,12, Ex. F]

In support of its motion for summary judgment, NME submitted evidence of Kraujalis stating that he fired Plaintiff for dishonesty and because Plaintiff was a poor pilot. [CR 20, 10; CR 25, 4; CR 61 at 222]

Kraujalis said he relied upon two purported incidents of dishonesty. The first occurred during a landing at Lexington, 9 months before termination, ("the Lexington landing"). Bleasdell made a hard landing while carrying Eamer as a passenger in the new G-III. The plane bounced several feet back into the air. Instead of immediately completing the landing with marginally sufficient runway, Bleasdell elected to go-around for a second approach. Bleasdell completed the

second landing without difficulty. Nevertheless, during the second attempt, Kraujalis observed Bleasdell tell a "lie". Moments after the bounce and Bleasdell's election to go around, Eamer shouted up from the cockpit demanding an immediate explanation. Plaintiff, in Kraujalis' presence, told the engineer to tell Eamer that something had blown across the runway. That was untrue. [Compare CR 20, 6; CR 58 at 5-26; CR 32, 22]

As to the second incident, Kraujalis states that Eamer overheard Bleasdell tell the NME's travel department, during a telephone call, that Bleasdell was "5 minutes late" to the airport, when, according to Eamer, Bleasdell had been 40 minutes late. Bleasdell insists that Eamer, who is deaf, misheard the conversation. [Compare CR 20, 8; CR 58, 10-11; CR 32,33-35]

Kraujalis also states that he terminated plaintiff based upon his opinion that Plaintiff was a mediocre pilot, lacked emergency skills, was "rigid", "autocratic", and "just wasn't loose." [CR 61 at 113:1-20]. He offered two incidents supporting his conclusion.

The first incident involved a hard landing by another pilot at Gainsville, Georgia in July, 1990. Plaintiff was allowing his co-pilot, Andy Higgins, to land the aircraft when Higgins experienced several hard bounces and seemed unable to regain full control. Bleasdell took control and safely completed the landing. [CR 58, 9 Ex D; CR 60 at 272-284]

Following this incident, the co-pilot was restricted and ordered to receive remedial training; Bleasdell, in contrast, was not found to be at fault. [CR 58, 9; CR 32, 26-29, 42, Ex D] This incident occurred several months before Kraujalis came to NME. After joining NME, Kraujalis never spoke with Bleasdell, Higgins or Metz concerning Bleasdell's performance at Gainsville. [CR 32, 26-29, 42, Ex D; CR 61 at 67, 69, 78.] However, Kraujalis states that, after his promotion, he reviewed Bleasdell's one page report, and concluded Bleasdell should have acted sooner. [CR 25, 4; CR 20, 9; CR 32, Ex D].

The second incident was the landing at Lexington in April, 1991, discussed above.

These two landings had occurred 8 months and 16 months respectively prior to termination on January 17, 1992. It is undisputed that during the 8 months prior to Bleasdell's termination, he landed NME aircraft, including the new Gulfstream III many times, all without any problem or incident whatsoever. [CR 58, 8; CR 32, ¶¶ 20-21; CR 61, 222]

Petitioner repeatedly describes the two hard landings as "near crashes". That phrase is a grossly inaccurate and unsupported misrepresentation. Although imperfect, neither landing was an emergency and neither involved any damage or injury. [CR 60, at 273-282; CR 58, 8-9; CR 32, ¶¶ 19-21, 30-31. D; CR 61, 78, 132-133, 179:20--181]

The trial court granted summary judgment for Petitioner, ruling that no issue of discriminatory termination was raised. [CR 49 at 15-21 (satisfactory performance); Id. at 23-26 (pretext)] The Ninth Circuit Court of Appeal reversed, holding that Bleasdell had produced substantial evidence supporting both his prima facie case and the falsity of NME's explanation, and that these together raised a reasonable inference of discrimination, thus making the issue of whether NME's motives were discriminatory a triable one for the factfinder. Petition, Appx. A.

II. REASONS FOR NOT GRANTING CERTIORARI

A. NME'S "SUPERVISOR" ARGUMENT SEEKS TO MISCHARACTERIZE A FACT INTENSIVE ISSUE AS A DEBATE OVER IMPORTANT QUESTIONS OF LAW.

NME defines this issue as follows:

"Whether a former supervisor's disagreement with an employer's decision to terminate an employee creates a triable issue of fact as to whether the employer's stated reasons for the employee's termination were false, where the supervisor does not refute the facts of the case."

The supervisor to which NME refers is Robert Metz. Metz was Plaintiff Bleasdell's supervisor

throughout all of the "incidents" mentioned by Kraujalis. It was Metz's job duty at NME to evaluate Plaintiff's performance both generally and with respect to the incidents. Metz sets forth his evidence in a declaration in excess of 18 pages in length plus exhibits. (See Metz Declaration at C.T. 32) Petitioner has conspicuously failed to include that declaration it it's Appendix. Rather, Petitioner chooses instead to merely characterize its contents as expressing "mere disagreement" with NME's reasons for termination. That characterization is plainly inaccurate. Given that Petitioner's key premise is its construction of what Metz stated, it was Petitioner's duty to include the declaration in Petitioner's Appendix in order to enable the Court to confirm whether that premise was accurate. See Rule 15(i)(vi).

Here, Petitioner misrepresents both the evidence within Metz's declaration and the Court of Appeal's use of that declaration. We discuss these points below:

1. It is untrue that the Ninth Circuit decision in this case relied upon supervisor Metz's mere "disagreement" with NME's decision as its basis for finding pretext. The Court's appellate opinion never stated or suggested that a supervisor's mere "disagreement" with the employer's decision is sufficient to show pretext. On the contrary, the Court stated as follows:

> "In particular, while the declaration from Metz acknowledges that the landing incidents

cited occurred, it disputes that they were truly the basis for Bleasdell's termination.

> "A former supervisor who is personally aware of the facts cited by an employer to justify its decision to terminate a plaintiff can offer important insight into whether the reasons offered by the defendant were pretextual. Very rarely can a plaintiff find direct evidence of intent. This is especially true when defending against an employer's motion for summary judgment. Metz's declaration creates a triable issue as to whether the stated reasons for Bleasdell's termination were false. That is a decision which must be left to the finding of fact."
>
> [Petition, Appx. A, pg. 8a]

In short, the Court of Appeal never adopted the blunt misstatement of law which NME now attributes to it--i.e. that Metz's mere disagreement with NME's decision was sufficient evidence of pretext. The actual issue raised by the Court of Appeal decision is routine and fact-intensive: Whether Metz's declaration, considered alone or with the other evidence, was sufficient to support a factual finding that NME's purported reasons for termination were not truthful. NME's misstatement of the actual issue is significant for purposes of its Petition. Here, no important rule of law need be determined. In order to justify the extraordinary relief that NME now seeks, we respectfully submit that more is necessary than NME's disagreement with the

Court below over whether evidence was sufficient to support a finding of fact.

2. It is untrue that Metz's declaration merely "disagree[ed] with the employer's decision." We agree that declarations of a plaintiff, co-worker or supervisor which merely state conclusions that plaintiff's performance was satisfactory, or which express mere disagreement with the employer's decision to terminate, are rationally insufficient without more to show that that the employer's assessment was dishonest. Dey v. Colt Const. & Development Co. 28 F.3d 1446, 1460-1461 (7th Cir. 1994); Anderson v. Baxter Health Care Corp., 13 F.3d 1120, 1125 (7th Cir. 1994); Williams v. Williams Elec., Inc. 856 F.2d 920, 924 (7th Cir. 1988) Here, in contrast, Metz supplied far more than conclusory "disagreement" with NME's decision. On the contrary, Metz's declaration supplied both specific facts and relevant expert opinions based upon those facts which rationally challenge the genuiness of NME's proffered reasons for terminating Bleasdell. See Dey, Supra; Weldon v. Craft, 896 F.2d 793, 799 (3rd Cir. 1990); Shager v. Upjohn Co., 913 F.2d 398, 400-401 (7th Cir. 1990)

We submit that pretext may be shown by evidence demonstrating, "such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could rationally find them`unworthy of credence.' " Fuentes v. Perskie, 32 F.3d 759, 765 (3d Cir. 1994).

According to NME, Kraujalis' decision to terminate Bleasdell was based upon his good faith application of professional standards of aviation management to the facts surrounding the three "incidents" which Kraujalis describes.

Because Metz had actually investigated each "incident" as part of his own professional duties as Defendant's manager, he possessed substantial relevant information concerning those incidents. Moreover, because Metz was himself a 30 year veteran pilot and administrator, he was uniquely qualified to tender both facts and expert opinions concerning the genuiness of Kraujalis' decision process in connection with those incidents.

Metz's declaration specifically described the facts and circumstances surrounding each of the three incidents in question--incidents that Metz had himself investigated for NME. Metz showed that Kraujalis' version of those incidents was highly exaggerated and distorted.

Metz's declaration also specifically analyzed Kraujalis' decision process as revealed in Kraujalis' deposition and declaration. Metz showed facts permitting a finding that Kraujalis made no serious, good faith effort to obtain the true facts about the very "incidents" he relied upon. Metz showed that Kraujalis ignored obvious, specific sources of facts which any aviation administrator, acting in good faith, would have considered. Further, Metz showed that Kraujalis' highly

adverse conclusions were grossly unsupported by the sources upon which Kraujalis purported to rely.

Thus, Metz's evidence did not merely "disagree" with Kraujalis' business judgment; it also set forth specific facts and expert opinions demonstrating weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in Kraujalis' proffered legitimate reasons for terminating Plaintiff, such that a reasonable factfinder could rationally find them`unworthy of credence.' See, Fuentes, supra, 32 F.3d at 765.

3. NME's statement that supervisor Metz "does not refute the facts of the case" is materially misleading. For NME, the "facts of the case" are very few. They include only the physical occurrence of the questioned landings and the bare fact that the disputed telephone conversation occurred. NME broadly applies the "business judgment rule" to exclude as irrelevant all other facts and evidence surrounding those bare events (ostensibly because the "correctness" of NME's interpretation of those incidents is not at issue). Under this view, if Metz confirmed that the questioned landings and one disputed telephone conversation occurred, pretext is conclusively disproved.

Yet, while pretext does not directly focus upon the "correctness" of the employer's reasons, it does focus upon the "genuineness" of those reasons. And in making that key determination, the facts and circumstances surrounding the "incidents" obviously may be relevant. By advocating that those facts and

circumstances are irrelevant to pretext, NME throws the baby out with the bath water.

Just as a genuine decision may be based upon mistaken facts, so too a phony decision can be explained on the purported basis of the employer's version of undisputed facts. Futrell v. J.I.Case (1994) 38 F. 3d 342, 349. Common sense informs us that employers are sometimes willing to cull undisputed adverse facts from an employee's record and untruthfully assert them as the reason for a termination actually motivated by other undisclosed factors.

The evidence supporting such mendacity is generally very difficult to uncover even in meritorious cases. Surely then, pretext analysis cannot disregard evidence which circumstantially shows such mendacity to be probable. Metz's declaration provided the Court with an evidentiary basis for such scrutiny.

In short, the Court of Appeal did not hold that a supervisor's mere "disagreement" with the employer's decision is sufficient to establish that an employer's reason for its adverse decision was pretextual. That "issue" is a straw man. The true issue is and was whether Metz's declaration, alone or with other evidence, constituted substantial, probative evidence that the purported incidents and reasons tendered by NME were not the genuine reasons for its decision. This is a fact intensive issue--not a controversy over an important rule of law. We submit that the Ninth Circuit not only addressed the correct issue, but decided it

correctly. A revisiting of that issue by this Court would be a significant waste of scarce judicial resources.

B. THIS CASE IS A POOR VEHICLE FOR REVIEWING NME'S "SUPERVISOR" ARGUMENT.

Aside from Metz's declaration, there was abundant other evidence which supported a finding that NME's reasons for termination were pretextual. Because the Court of Appeal was required only to determine whether sufficient evidence existed to withstand summary judgment, it was not required to discuss that additional evidence. Thus, even if Metz's declaration were itself deemed insufficient evidence of pretext, there would remain the question of sufficiency of the other evidence on that same issue.

We summarize several examples of this evidence that focuses upon Kraujalis' reliance upon "poor piloting" as a reason for termination:

1. In January 1992, it is undisputed that NME demoted Robert Metz from his position of manager of the aviation department and replaced him with Walter Kraujalis. Within days of his assuming the role of manager, Kraujalis terminated Bleasdell. At that time, Bleasdell was the oldest pilot in the Department, at 52 years old. [Id., 39] Metz was second oldest, at two months short of 48 years old. [CR 26, 5] Kraujalis was approximately 35 years old. [Id., 40; CR 20, 10]

2. At the time of his termination, in January, 1992, Bleasdell had served as an NME pilot for over ten years. During that time nobody had ever informed Bleasdell that he had any serious deficiencies in his piloting skills--not Eamer, Kraujalis, Metz or anyone else. [Bleasdell Depo. p.273-282; CR 58, ¶¶5-7, 9, 11-12; CR 61 at 78:17-20, 132-133:3-23; see also Metz Decl., CR 32, ¶¶ 16-17, Ex C and ¶¶30-31,38, Ex D]

3. Throughout 1991, Metz required that Kraujalis serve as both a pilot and a trainer, familiarizing pilots including Bleasdell on the new G-III. [CR 32, 16-17, Ex C] Kraujalis states he observed Bleasdell during 28 flights during that period. [CR 20 5 at 3:4] It is within this context that Kraujalis now purports to have then observed mediocre piloting, lack of "emergency skills", "rigid" piloting, [CR 32, 40; CR 61 at 113:1-20, 130, 179:20-180:9] Yet, it is undisputed that he never disclosed these observations through normal channels--channels that would have afforded Bleasdell a chance to respond and/or improve. He never informed Metz, the Department Manager, whose job was to maintain safe standards and who had to rely upon receipt of such reports. [CR 61 at 78:17-20, 132:25-133:1-23; CR 32, 19, 21] Nor did he inform Bleasdell. [CR 58, 5 at 2:4-16, 6 at 4:4-12, 7 at 4:20-24, 11-12

4. Juxtaposed with this strange silence is a dubious volunteerism. Kraujalis conveys his critical opinions about Bleasdell to CEO Eamer--a non-pilot, and frequent passenger--during private conversations. These two individuals had a private relationship; Eamer

was putting Kraujalis through law-school and allowing him to work part-time. [CR 42, 34; CR 32, 4-5,38] Most tellingly, Kraujalis ("in late 1991") even offered Eamer criticism about Bleasdell's performance at the Gainsville landing of July, 1990--an event that occurred months before Kraujalis joined NME. [CR 20, 4] At such meeting, Kraujalis had no reliable facts about Bleasdell's performance at Gainsville; he hadn't even read Bleasdell's one page memo, which he later claimed to rely upon exclusively. [CR 20 (compare 7 & 9)]

5. The second of the two "hard" landings which Kraujalis faults (the "Lexington landing") occurred in April, 1991. [Compare CR 20, ¶5 and CR 58, ¶5-6] During the nine months between that landing and his termination in January, 1992, Bleasdell landed the same aircraft (NME's new Gulfstream III) many times--all without a single unusual incident. [CR 58, 8; CR 32, ¶¶ 20-21; CR 61, 222]

6. Kraujalis testified as to Bleasdell's qualities as a pilot that supported his decision to terminate him. The testimony supports an inference that Kraujalis' view of Bleasdell was influenced by age based stereotypes. Kraujalis viewed Bleasdell as "an autocrat." "He just wasn't loose." "He was rigid in certain situations." [CR 61 at 113:1-20]. Prior to his promotion, Kraujalis had conversations about Bleasdell with three other pilots about Bleasdell--Adler, McKenzie and Higgins--all substantially younger than Bleasdell. Kraujalis said that these pilots agreed with him that Bleasdell was "autocratic" and "rigid." [CR 61 at 132, 198]. Asked to explain these qualities in more

detail, Kraujalis said that Bleasdell was unreceptive to dialogue in the cockpit about specific maneuvers or the flight in general. [CR 61 at 130] Yet, Kraujalis was unable to recall any actual occurrence when Bleasdell displayed an "autocratic" quality. [Id. at 131:6-10] Kraujalis was likewise unable to recall any specific instances where Bleasdell was unresponsive to dialogue. [Id. at 130:7-25] Likewise, despite his status as company "trainer", Kraujalis admitted that he never noted or recorded any incident of Bleasdell being rigid, autocratic or unresponsive to input. [Id. at 130:22-131:1-7] (This evidence tended to corroborate Metz's declaration, which stated that Kraujalis generally appeared uncomfortable interacting with the older pilots, particularly Bleasdell and Metz. [CR 32, 40] Metz observed that Kraujalis usually expressed reluctance to accept either Metz or Bleasdell's verbal input, suggestions and comments about aviation. [Id] Metz noticed that Kraujalis acted more coldly when interacting with older pilots than with younger pilots. [Id.])

7. At the time of termination, NME had an express policy of progressive discipline. [CR 32, 36, Ex E,F] Kraujalis was aware of this policy but decided not to apply it to Bleasdell. [CR 61 at 190, 222] Kraujalis testified that he refused to allow remedial training to improve Bleasdell's allegedly "mediocre" piloting skills, as an alternative to termination. [CR 61 at 199] Kraujalis testified that he had concluded that Bleasdell "wouldn't make a significant improvement." [CR 61 at 199] Asked at deposition to explain, Kraujalis answered that you had to be a pilot to understand. [Id.] He said

that the factors were subtle and based upon years of experience. [CR 61 at 200]

We do not summarize the substantial additional circumstantial evidence of pretext. Our point is that, to merit the extraordinary relief sought, Petitioner is required to show the importance of the issues for which it seeks review. Yet, the Petition neither denies nor addresses the plethora of evidence other than Metz's statements about the "incidents" which supports a finding of pretext. Rather, Petitioner simply ignores that additional evidence, never demonstrating that it was insufficient on that issue. Hence, Petitioner has failed to establish any substantial prejudice flowing from the asserted insufficiency of the Metz declaration. At a minimum, scrutiny of Plaintiff's additional evidence would be necessary to determine the effect of the claimed error. Hence, this case does not provide a good vehicle for reviewing the sufficiency of Metz's declaration, even assuming that task was sufficiently important for this Court to undertake.

C. THIS CASE IS NOT A CONVENIENT OR APPROPRIATE VEHICLE FOR CONSIDERING THE LEGITIMACY OF THE "PRETEXT-PLUS" APPROACH.

Under the "pretext-plus" approach, a plaintiff at the summary judgment stage is not only required to produce evidence which shows plaintiff's prima facie case and the falsity of the employer's reasons for termination, but is also required to produce yet additional evidence showing that the false reason was

tendered as a pretext for discrimination. The pretext-plus approach assumes that the prima facie case, coupled with substantial evidence that the employer's reason is false, are together insufficient to rationally permit the factfinder to infer that discrimination has occurred. Petition, District Court opinion, Appendix B, 40a-41a (even assuming prima facie case, plaintiff must "show both that defendants' articulated reason was false and that the real reason for termination was discrimination").

Respondent submits that the doctrine of "pretext-plus" is a meritless doctrine and that its disavowal is an important task for this court. Nevertheless, Respondent also submits that the present case--in which the Ninth Circuit rejected the doctrine of pretext plus--is an inferior vehicle for addressing that doctrine. A better case would involve a plaintiff has been denied the right to trial, notwithstanding that they produced substantial evidence of both a prima facie case and the falsity of the employer's reasons. It is the destructive aspects of applying pretext-plus--rather than its appropriate rejection--which render that doctrine sufficiently "important" for this Court's consideration.

1. Petitioner's Advocacy For "Pretext-Plus" Is Based Upon A Misreading Of The Hicks Decision.

Petitioner refers variously to both (1) this Court's use of "seemingly inconsistent language" in St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993); and (2) the

Appellate Court's misreading of Hick's "seemingly clear" upholding of pretext-plus. Respondent submits that Petitioner's own seeming inconsistency stems from its failure to recognize the difference between the respective burdens placed upon the courts, on the one hand, and the factfinder, on the other. That is, Petitioner does not distinguish between the fact-proponent's (1) burden of producing sufficient evidence to reasonably support a finding that an ultimate fact is true, and (2) his or her burden of actually persuading the factfinder that an ultimate fact is true. While courts oversee the first burden, factfinders decide the latter. (C. McCormick, Evidence (West, 4th ed. 1992), §§336-339).

It is hornbook law that evidence may be sufficient to permit the factfinder to find the ultimate fact, but not sufficient to compel the factfinder to do so. (McCormick, supra, §349, pg. 575). As McCormick points out,

> "Thus, it is entirely consistent for a court to hold that a party's evidence is sufficient to withstand a motion for directed verdict [or to withstand summary judgment] and yet to uphold a verdict for its adversary."
>
> [§349, pg. 575]

In other words, where the evidence supports conflicting but reasonable inferences about whether the ultimate fact (i.e. decision motivated by discrimination) is true, the decision is one for the factfinder, not the court.

Hicks clearly recognized this basic distinction between the respective burdens of court and factfinder. There, this Court addressed a trial record which contained evidence sufficient to reasonably support a finding of both plaintiff's prima facie case and that the defendant's explanation was pretextual. Yet, the trial court (sitting in bench trial) ultimately found that it was not persuaded that discrimination had occurred and awarded a trial verdict for defendant. (509 U.S. 506, 509)

The Supreme Court upheld the trial verdict for defendant, while at the same time emphasizing that (given the evidence of both the prima facie case and of pretext) the factfinder could have legitimately decided the issue of discrimination either way.[1]

---

[1] In Hicks, the court of appeals reversed the trial courts verdict, concluding that "[o]nce plaintiff proved all of [the employer's] proffered reasons for the adverse employment actions to be pretextual, plaintiff was entitled to judgment as a matter of law." Hicks v. St. Mary's Honor Center, 970 F.2d 487, 492 (8th Cir. 1992), reversed, 509 U.S. 502 (1993). It was this holding which the Supreme Court reversed, concluding that judgment for the plaintiff is not compelled by the disbelief of the employer's reasons. 509 U.S. at 511. At the same time, however, the Court also explicitly stated that a finding that the reasons proffered are pretextual permits the factfinder to draw the inference that the defendant intentionally discriminated against the plaintiff. Id.

Addressing plaintiff's burden of persuasion, the Court made clear that even if the factfinder found in favor of plaintiff with respect to both the elements of the prima facie case and pretext, the factfinder nevertheless must specifically find that discrimination has occurred, in order for liability to attach. As the Court stated, "it is not enough to disbelieve the employer," 509 U.S. at 519, and the plaintiff must show "both that the reason was false, and that discrimination was the real reason," Id. at 515.

Nevertheless, addressing plaintiff's burden of producing evidence, the Court stated that "[t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination." Id. The Court explained that "rejection of the defendant's proffered reasons, will permit the trier of fact to infer the ultimate fact of intentional discrimination," and continued: "the Court of Appeals was correct when it noted that, upon such rejection, '[n]o additional proof of discrimination is required.'" Id. at 511 (emphasis added) (quoting Hicks, supra, 970 F.2d at 493)."

In short, as did Professor McCormick, the Hicks Court determined that it was entirely consistent for a court "to uphold a verdict for the defendant", despite the fact that the plaintiff's "evidence is sufficient to withstand a motion for directed verdict [or to withstand summary judgment]." (McCormick, supra).

The Ninth Circuit decision in Nidds v. Schindler Elevator Corp., 113 F.3d 912 (9th Cir. 1996)--upon which the Court of Appeal relied in the present case--interpreted Hicks as holding as follows:

> At trial, [plaintiff] must prove "both that the [employer's stated] reason was false, and that discrimination was the real reason." [citing Hicks] However, if [plaintiff] persuades the jury that the defendant's alleged reason is false, then "[t]he factfinder's disbelief of the reasons put forward by the defendant...together with the elements of the prima facie case...will permit the trier of fact to infer the ultimate fact of intentional discrimination, and no additional proof of discrimination is required." [citing Hicks] Thus to survive summary judgment, [plaintiff] is not required to provide direct evidence of discriminatory intent as long as a reasonable factfinder could conclude--based on [plaintiff's] prima facie case and the factfinder's disbelief of [defendant's] reasons for discharge--that discrimination was the real reason for [plaintiff's] discharge.

Nidds, 113 F.3d at 918, fn. 2 (emphasis in original). Petitioner claims that the above language shows that the Nidds Court "ignored" Hicks. In contrast, we submit that this language demonstrates a clear understanding of both Hicks and the differing functions of courts and factfinders in our system.

2. Pretext-Plus Is Based Upon The False Assumption That The Prima Facia Case Lacks Substantial Probative Value On The Issue Of Discrimination.

Respondent agrees that "pretext-plus" is an important doctrine, in that its application reverses sub-silentio McDonnell Douglas Corp. v. Green, (1973) 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 and its progeny. McDonnell Douglas and subsequent cases defined both a set of presumptions and a structure of threshold factual findings, which when satisfied, create a triable issue of discrimination. Those innovations were based upon this Court's recognition that, while discrimination clearly exists, it is extremely difficult to prove, and that "smoking gun" evidence is usually unavailable. When pretext-plus is applied in summary judgment or directed verdict proceedings, it substantially defeats the McDonnell Douglas structure and renders impracticable plaintiff's reliance upon circumstantial evidence in discrimination cases.

The fundamental defect of pretext-plus is that it inherently assumes that--following plaintiff's introduction of substantial evidence that the employer's stated reason is false--plaintiff's prima facie case fails to retain substantial probative value on the issue of discrimination.

The initial presumption of discrimination raised by plaintiff's prima facie case arises not only from the public policy aim to "help plaintiffs prove difficult

cases." Rather, the presumption arises primarily from reasonable probabilities--the same bedrock upon which inferences derive. As Chief Justice, then Justice, Rehnquist has explained, the initial presumption of discrimination arises from the plaintiff's prima facie case of discrimination "because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978) (emphasis added).

Justice Rehnquist continued:

> [W]e are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race. Id.

Where the employer counters plaintiff's evidence of the prima facie facts with evidence of a non-discriminatory reason for its decision (as it is required to do to avoid a compelled finding of liability) we no longer presume discrimination. This is because the probabilities are then substantially altered--that is, such evidence tends to reduce the likelihood of discrimination to a level below "more likely than not".

Pretext, like the prima facia case, has probative force because of our general knowledge of how the world works. Our experience tells us that the employer's falsity in explaining its reason for decision makes it more likely than not that its true reason was an impermissible one. As the Second Circuit recently remarked in the context of an employment discrimination case: "Resort to a pretextual explanation is, like flight from the scene of a crime, evidence indicating consciousness of guilt, which is, of course, evidence of illegal conduct." Binder v. Long Island Lighting Co., 57 F.3d 193, 200 (2d Cir. 1995); see also 2 Wigmore § 278(2) (Chadbourne Rev. 1979).

Thus, where the plaintiff has countered the employer's stated reason with substantial evidence that this reason is false (as plaintiff is required to do to avoid a compelled finding of non-liability) the previous presumptions of both discrimination and non-discrimination fall away. Nevertheless, at that juncture the probative value derived from the prima facie case not only remains, but is augmented. This follows both rationally and necessarily because,

a. The evidence of pretext permits the factfinder to rationally reject the employer's stated reason.

b. If the factfinder does choose to reject the employer's stated reason as false, it follows that the factfinder can rationally disregard the undermining probative force which that reason otherwise might have

exerted upon the prima facie case. In other words, the factfinder can then rationally accord the prima facie facts their full, original probative value--unfettered by the undermining probative force of the employer's stated reason. It can rationally draw from those prima facie facts the same inferences that Chief Justice Rehnquist explicitly described in Furnco Construction.

c. Further, a factfinder who chooses to reject the employer's stated reason as false can rationally accord probative value to that false proffer--i.e. can (but is not required to) recognize the increased likelihood that the employer's true reason is an impermissible one. Moreover, the factfinder may rationally find probative value in the fact that the employer's false tender was in response to a specific and formal allegation of discrimination. Thus, the factfinder may find a connection between the discrimination alleged and the employer's probable motive for responding falsely—i.e. that the employer's true reason is a discriminatory one.

d. Finally, this same factfinder can then rationally find that both the prima facie facts and employer's falsity rationally point in the same direction--i.e. the factfinder can recognize that the combination of these two sets of facts substantially augments the likelihood that the employer's true reason is discriminatory.

In short, having produced substantial evidence of both the prima facie facts and pretext, the plaintiff has supplied evidence which rationally increases the probability of discrimination to a level not merely equal

to but greater than existed prior to the employer's articulation of a stated reason.

We submit that in Hicks, this Court implicitly recognized these points when it stated that the prima facie facts coupled with the factfinder's disbelief of the employer's reason will permit the factfinder to infer the ultimate fact of discrimination, 509 U.S. at 511, even though the presumption of discrimination "drops from the case" after the employer proffers a legitimate reason for its actions. Texas Dept. of Comm. Affairs v. Burdine, 450 U.S. 248 (1981).

Pretext-plus runs directly counter to the reasoning of Hicks because it inherently presumes that plaintiff's substantial evidence supporting the prima facie facts, coupled with substantial evidence of pretext, are together insufficient to permit the factfinder to infer the ultimate fact of discrimination. Under pretext-plus, a meritorious plaintiff who has produced substantial evidence supporting both (1) his or her prima facie case and (2) the falsity of the employer's reasons is then asked: "Okay. Now, where is your 'smoking gun'?"

In short, pretext-plus construes the McDonnell Douglas structure as a mere formalist preface to the problem of showing discrimination--imposing substantial obstacles but providing no real guidance about what threshold facts will permit plaintiff to get to a jury. The application of pretext-plus, by those Courts which have adopted it, effectively creates a "catch-22" which prevents meritorious discrimination cases from reaching trial, where those cases are based upon

circumstantial evidence. For these reasons, Respondent certainly agrees that the "issue" of pretext-plus raises important concerns worthy of this Court's attention.

Nevertheless, despite the undisputed importance of this "issue", plaintiff's case is not an appropriate vehicle for addressing it. Conservation of this Court's judicial resources suggests that the optimal circumstance for addressing pretext-plus is where it causes harm. In this case, the Ninth Circuit rejected the notion that pretext-plus defines Plaintiff's burden of producing evidence at the summary judgment stage. In short, this case does not present the situation that makes "pretext-plus" significant--its application as law.

CONCLUSION

For the reasons given above, the petition for writ of certiorari should be denied

Respectfully submitted,

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